MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

PROSECUTORS' COMMENTS ON DEFENDANTS' POST-*MIRANDA* SILENCE AT ISSUE IN CRIMINAL CASES BEFORE MICHIGAN SUPREME COURT THIS WEEK
Did prosecutor's cross-examination of defendant about his silence violate due process?

LANSING, MI, January 20, 2009 – Whether a prosecutor violated a defendant's due process rights by cross-examining him about his post-*Miranda*-warning silence is at issue in a case that the Michigan Supreme Court will hear in oral arguments this week.

In addition to the cross-examination, the trial prosecutor in *People v Borgne* also suggested in closing argument that the jury could infer from the defendant's post-warning silence that he fabricated his trial testimony. The Michigan Court of Appeals, in granting the defendant a new trial by a 2-1 vote, found that the prosecutor violated the defendant's due process rights. The majority cited *Doyle v Ohio*, 426 US 610, 619 (1976), in which the U.S. Supreme Court held that using a defendant's post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment. The dissenting judge on the panel found no violation of *Doyle*, stressing the context for the questioning, and also said that any error was harmless because there was substantial evidence of the defendant's guilt.

The *Doyle* decision is also at issue in *People v Shafier*, in which the defendant appeals his convictions for criminal sexual conduct against his adopted daughter. The prosecutor in that case questioned the arresting officer about the defendant's post-*Miranda* silence, in addition to asking the defendant several times whether he had ever denied committing the crime; in closing argument, the prosecutor also brought up that the defendant had not denied abusing the girl. A split Court of Appeals panel affirmed the convictions, finding that even though the prosecutor's comments violated *Doyle*, the defendant had not shown that any error affected the trial because of the other evidence of his guilt.

The Court will also hear oral arguments in *McNeil v Charlevoix County*, in which the plaintiffs, a group that includes smokers and business owners, challenge a multi-county health agency regulation that, in addition to restricting workplace smoking, forbids employers from taking adverse action against employees who assert the right to a smoke-free environment. The plaintiffs contend that the regulation is pre-empted by the state's Public Health Code, but both the trial court and Court of Appeals disagreed, finding that the Public Health Code did not expressly or impliedly preempt local regulations.

The other cases the Supreme Court will hear include comparative fault, medical malpractice, worker's compensation, and criminal law issues.

Court will be held on **January 21 and 22** in the Supreme Court's courtroom on the sixth floor of the Michigan Hall of Justice in Lansing. Oral arguments will begin each day at **9:30 a.m.** The Court's oral arguments are open to the public.

Please note: the summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Wednesday, January 21
Morning Session

PEOPLE v BORGNE (case no. 134967)
Prosecuting attorney: Mark G. Sands/(517) 373-4875
Attorney for defendant Michael J. Borgne: Jacqueline J. McCann/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial Court: Wayne County Circuit Court
At issue: A split panel of the Court of Appeals reversed the defendant's convictions for armed robbery and felony-firearm and granted him a new trial, finding that the prosecutor violated the defendant's constitutional rights under *Doyle v Ohio*, 426 US 610 (1976). In *Doyle*, the U.S. Supreme Court held that, where a defendant in a criminal case exercises the right to remain silent after receiving a *Miranda* warning, using the defendant's silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment. Did the prosecutor violate the defendant's due process rights by cross-examining him about his post-*Miranda*-warning silence and suggesting in closing argument that the jury should infer from the defendant's silence that he fabricated his trial testimony? Was the defendant's claim of error under *Doyle* properly preserved at trial? What is the standard of review on appeal? Was any error harmless under the applicable standard of review?
Background: A woman was robbed at gunpoint at a gas station in Detroit. Michael J. Borgne was found hiding in a nearby abandoned building, but the victim's purse and the gun used to commit the crime were not recovered. At his trial, Borgne claimed that he was in the building because he was being shot at. A jury found him guilty of armed robbery and felony-firearm. But in an unpublished per curiam opinion, the Court of Appeals reversed Borgne's convictions by a 2-1 vote and remanded the case to the trial court for a new trial. The Court of Appeals majority noted that the prosecutor extensively cross-examined Borgne, at trial, about his post-*Miranda*-warnings silence; the prosecutor also suggested in closing argument that the jury should infer from Borgne's exercise of his right to remain silent that he fabricated his trial testimony. The prosecutor's actions violated Borgne's constitutional rights, the majority said, citing *Doyle v Ohio*, 426 US 610, 619 (1976). In *Doyle*, the U.S. Supreme Court held that using a defendant's post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the

Fourteenth Amendment. The Court of Appeals majority concluded that the prosecutor's use of Borgne's silence was extensive and repetitive, amounting to a clear violation of Borgne's due process rights as interpreted in *Doyle*. The majority could not "conclude, given the facts of this case, that the flagrant and repeated violation did not affect the outcome of the lower court proceedings." The dissenting Court of Appeals judge found no violation of *Doyle*, stressing the context in which the prosecutor's questioning took place. He noted the aspects of Borgne's direct testimony that justified the challenged prosecutorial cross-examination and argument. The dissenting judge also concluded that any error was harmless beyond a reasonable doubt, saying that there was substantial evidence of Borgne's guilt; any revelation that Borgne did not make a statement to police had a negligible effect on the verdict, the dissenting judge said. The prosecutor appeals.

PEOPLE v SHAFIER (case no. 135435)
Prosecuting attorney: Douglas E. Ketchum/(269) 673-0280
Attorney for defendant Harold Emmett Shafier, III: Christine DuBois/(248) 973-9195
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial Court: Allegan County Circuit Court
At issue: A jury found the defendant guilty of two counts of second-degree criminal sexual conduct, but acquitted him of three counts of first-degree criminal sexual conduct. The Court of Appeals affirmed. Did the prosecutor's comment on the defendant's post-*Miranda*-warnings silence violate the defendant's constitutional rights under the U.S. Supreme Court's ruling in *Doyle v Ohio*, 426 US 610 (1976)? Was the defendant's claim of error under *Doyle* properly preserved at trial? What is the standard of review on appeal? Was any error harmless under the applicable standard of review?
Background: Harold Emmett Shafier, III, was accused of sexually abusing his 13-year-old adopted daughter. Although the jury initially reached an impasse, it ultimately convicted Shafier of two counts of second-degree criminal sexual conduct, and acquitted him of three counts of first-degree criminal sexual conduct. On appeal, Shafier contended that he was entitled to a new trial, arguing that his constitutional rights, as set forth in *Doyle v Ohio*, 426 US 610 (1976), were violated. In *Doyle*, the U.S. Supreme Court held that using a defendant's post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment. In Shafier's case, the prosecutor asked the arresting officer numerous questions relating to Shafier's post-*Miranda* silence. The prosecutor also questioned Shafier several times about whether he had ever said that he did not commit the crime, and mentioned in his closing argument the fact that Shafier had not denied abusing the girl. Defense counsel objected once, on the basis of the attorney-client privilege. A split Court of Appeals panel affirmed Shafier's convictions in a published opinion. The majority found that the prosecutor's comments on Shafier's post-*Miranda* silence violated *Doyle*, but reasoned that Shafier had not shown that any error affected the outcome of the trial because of the other evidence of his guilt. The dissenting Court of Appeals judge would have granted a new trial on the basis of the constitutional error. Shafier appeals.

PEOPLE v WILLIAMS (case no. 135271)
Prosecuting attorney: Janice A. Kabodian/(248) 858-0656
Attorney for defendant Carletus Lashawn Williams: James Daniel Shanahan/(248) 614-4000
Trial Court: Oakland County Circuit Court

At issue: Over the defendant's objection, the trial court allowed the defendant to be tried before a single jury on drug delivery charges based on events several months apart and involving locations in different cities. Was the defendant entitled to separate trials under Michigan Court Rule 6.120? If the trial court erred in allowing the charges to be tried together, can the error be deemed harmless?

Background: Carletus Lashawn Williams was charged with possession with intent to deliver between 50 and 450 grams of cocaine, plus related weapons offenses, based on cocaine found in an Auburn Hills motel room Williams rented in November 2004. Williams was later also charged with possession with intent to deliver less than 50 grams of cocaine and related weapons offenses, based on cocaine found in his presence in a Pontiac house on February 2, 2005. Over Williams' objection, the trial court consolidated the two cases for trial before a single jury. The jury acquitted Williams of a marijuana possession count in one of the cases, but otherwise convicted him as charged. Williams appealed to the Court of Appeals, arguing that the trial court committed reversible error when it consolidated the cases for trial. At the relevant time, Michigan Court Rule 6.120(B) stated that a court "must sever unrelated offenses for separate trials," and defined "related" offenses to be offenses based on the same conduct or "a series of connected acts or acts constituting part of a single scheme or plan." Williams argued that, under MCR 6.120(B), the offenses here were unrelated; hence, he was entitled to separate trials. The prosecutor contended that the cases were related, but that even if they were not, any error was harmless. The Court of Appeals agreed with the prosecutor's reasoning and affirmed Williams' convictions in an unpublished per curiam opinion. "The evidence . . . indicated that both of defendant's offenses were connected parts of an ongoing scheme or plan to sell drugs," the panel stated. "When offenses are part of a single scheme or plan, joinder is permitted 'even if considerable time passes between them.' [quoting *People v Tobey*, 401 Mich 141 (1977)]." Williams appeals.

Afternoon Session

ROMAIN v FRANKENMUTH MUTUAL INSURANCE, et al. (case no. 135546)

Attorney for plaintiffs David Romain and Joann Romain: Christopher W. Bowman/(313) 961-7321

Attorney for defendant Insurance Services Construction: Anthony F. Caffrey, III/(616) 285-3800

Attorney for amicus curiae John Braden: John A. Braden/(231) 924-6544

Attorney for amicus curiae Michigan Defense Trial Counsel, Inc.: Phillip J. DeRosier/(313) 223-3500

Attorney for amicus curiae Michigan Manufacturers Association: Kristin B. Bellar/(517) 318-3100

Trial Court: Wayne County Circuit Court

At issue: The trial court ruled that one defendant was entitled to be dismissed from the lawsuit, holding that it had no legal duty to the plaintiffs. One of the remaining defendants then filed a notice naming the dismissed defendant as a "non-party at fault" under Michigan Court Rule 2.112(K) and Michigan's comparative fault statutes, MCL 600.2957 and MCL 600.6304. Under those provisions, a trier of fact can allocate fault to a non-party, meaning that defendants in the case would pay less in damages – and the plaintiffs would recover less from those defendants – depending on what percentage of fault is assigned to the non-party. The trial court granted the plaintiffs' motion to strike the notice of non-party fault, reasoning that a non-party cannot be "at

fault" if it does not owe a duty to the plaintiff. Was the trial court correct? Does the use of the term "proximate cause" in MCL 600.6304 conflict with other statutory provisions? Did the Legislature intend to impose a legal duty requirement as a precondition for allocating fault under MCL 600.2957 and MCL 600.6304?

Background: David and Joann Romain's home was contaminated with toxic mold. They submitted an insurance claim to Frankenmuth Mutual Insurance, which hired IAQ Management to test the home; the insurer also referred the Romains to Insurance Services Construction to remediate the mold. After the home was remediated and certified mold-free, the Romains moved back in, but later suffered mold-related illnesses. The Romains sued Frankenmuth, IAQ, and Insurance Services Construction. IAQ moved for summary disposition, arguing in part that it owed no legal duty to the Romains and should be dismissed from the lawsuit. The trial court granted IAQ's motion, ruling that IAQ did not have a contractual relationship with the Romains and so had no legal duty to them; moreover, IAQ had not engaged in misfeasance by making the mold situation worse, the trial court held. Insurance Services Construction then filed a notice naming IAQ a non-party at fault under Michigan Court Rule 2.112(K) and Michigan's comparative fault statutes, MCL 600.2957 and MCL 600.6304. MCL 600.2957 states: "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action." MCL 600.6304 defines "fault" as including "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." The trial court granted the Romains' motion to strike the notice of non-party fault. Insurance Services Construction then filed an application for leave to appeal to the Court of Appeals; after the Court of Appeals denied that application, Insurance Services Construction appealed to the Supreme Court. In an opinion, the Supreme Court denied leave to appeal, but addressed a conflict between two published Court of Appeals opinions interpreting Michigan's MCL 600.2957 and MCL 600.6304. Insurance Services Construction filed a motion for rehearing, and the Supreme Court vacated its opinion and granted leave to appeal.

ZAHN v KROGER COMPANY OF MICHIGAN, et al. (case no. 136382)

Attorney for third-party plaintiff F.H. Martin Construction Company: Janet Callahan Barnes/(248) 851-9500

Attorney for third-party defendant Cimarron Services, Inc.: Eric S. Goldstein/(248) 641-1800

Trial Court: Genesee County Circuit Court

At issue: A subcontractor signed an indemnification agreement with the general contractor, agreeing to pay for any liability imposed on the general contractor due to the subcontractor's negligence. The subcontractor's injured employee sued the general contractor and then settled the case; the trial court ordered the subcontractor to pay 80 percent of the settlement amount. But the subcontractor argued that it could not be held liable for its employee's injuries other than through a worker's compensation claim, and that the general contractor's settlement was solely for its own negligence. Does the indemnification agreement support the trial court's ruling? Can the employee's settlement with the general contractor include damages due to the subcontractor's negligence, even if the injured employee's exclusive remedy against the subcontractor would be

under the Worker's Disability Compensation Act (MCL 418.131(1))? By agreeing to indemnify the contractor, did the subcontractor voluntarily make itself liable for injuries its employee suffered on the job due to the subcontractor's negligence?

Background: Cimarron Services, Inc., a subcontractor on a Kroger store renovation project, entered into an indemnification agreement with the general contractor, F. H. Martin Construction Company. The agreement provided that "To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold Martin . . . harmless from all claims for bodily injury and property damage that may arise from the performance of the Subcontract work to the extent of the negligence attributed to such acts or omissions by Subcontractor, or anyone employed or contracted by Subcontractor for whose acts any of them may be liable. In no event shall the indemnity contained herein be deemed to cover damages arising exclusively through the negligence of Martin." One of Cimarron's employees, Timothy Zahn, was hurt on the job and sued Martin Construction and Kroger for negligence. Zahn alleged in his complaint that "as a direct result of the failure to maintain the area where Plaintiff was working in a safe condition, free from readily observable, avoidable dangers, Defendants Kroger and Martin Construction caused Plaintiff to suffer injuries." Martin settled this claim, and then pursued Cimarron under the indemnification clause that made Cimarron liable for any tort liability Martin incurred due to Cimarron's negligence. Cimarron countered that it could not be liable in tort for Zahn's injury, citing the exclusive remedy provision of the Worker's Disability Compensation Act, (MCL 418.131(1). Under the WDCA, an employee's exclusive remedy for work-related injuries is through an worker's compensation claim against the employer, rather than through a tort lawsuit. Cimarron also contended that the settlement was solely for Martin's own negligence. The trial court did not agree; following a bench trial, the court found that Cimarron was 80 percent at fault for Zahn's injury. Accordingly, the court ordered Cimarron to reimburse Martin for 80 percent of the settlement amount. The Court of Appeals affirmed this judgment in an unpublished opinion, rejecting Cimarron's contention that the award was improper because the state legislature had abolished joint and several liability – the legal doctrine under which a plaintiff may collect an entire judgment from any of a group of defendants found to be at fault, regardless of an individual defendant's percentage of fault. Cimarron appeals.

Thursday, January 22
Morning Session

VANSLEMBROUCK v HALPERIN, et al. (case no. 135893)
Attorney for plaintiffs Markell VanSlembrouck, a Minor, by his Next Friend Kimberly A. VanSlembrouck, and Kimberly A. VanSlembrouck, Individually: Heather A. Jefferson/(248) 355-5555
Attorneys for defendants Andrew Jay Halperin, M.D., Michigan Institute of Gynecology & Obstetrics, P.C., and William Beaumont Hospital: Robert G. Kamenec, Hilary A. Dullinger/(248) 901-4068
Attorney for amicus curiae Livonia Family Physicians, P.C., Thomas I. Selznick, D.O., Toni Trate, D.O., Dr. J. Adam Kellman, D.O., Harold M. Friedman, D.O., Paul D. Jackson, D.O., Stuart Nathan, P.A., Tiffany Potts, P.A., Barbara Bergeski, P.A., and Mary Jane Gregory, P.A.: Paul R. Bernard/(248) 355-4141
Trial Court: Oakland County Circuit Court
At issue: This medical malpractice case involves a child who was allegedly injured at birth. MCL 600.5851(7) provides that, where a medical malpractice claim accrues to a child under

eight years old, the claim must be filed ". . . on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later." Are the plaintiffs entitled to the benefit of the tolling provision in MCL 600.5856(c) where the plaintiffs provided a notice of intent before the child turned 10, but filed their complaint after her tenth birthday? Does MCL 600.5851(7) provide a period of limitations?

Background: In this medical malpractice case, the plaintiffs claim that Markell VanSlembrouck was seriously injured at birth because of the defendants' negligence. MCL 600.5851(7) addresses when a medical malpractice lawsuit must be filed on behalf of an injured minor: ". . . if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a [two years after the claim accrues or six months after the claim was or should have been discovered], whichever is later." Shortly before VanSlembrouck's tenth birthday, the plaintiffs filed a notice of intent to sue as provided by MCL 600.2912b. When the 182-day notice period required under the statute ended, the plaintiffs filed their lawsuit; at that time, VanSlembrouck was 10 years old but within what the plaintiffs presumed to be the remaining limitations period. The defendants filed a motion for summary disposition, arguing that the trial court should dismiss the case because the plaintiffs' affidavits of merit were defective. Moreover, the entire lawsuit was barred by the statute of limitations, which expired before the plaintiffs' complaint was filed, the defendants contended. The plaintiffs responded in part that, under MCL 600.5856(C), the statute of limitations was tolled during the 182-day notice period and so did not run out when VanSlembrouck turned 10. The trial court dismissed the complaint, finding that the plaintiffs' affidavits of merit were defective; the court did not reach the defendants' statute-of-limitations argument. In a published opinion, the Court of Appeals reversed the trial court's ruling regarding the affidavits of merit, and also considered and rejected the defendants' argument that the lawsuit was not timely filed. The Court of Appeals remanded the case to the trial court for further proceedings. The defendants appeal.

PETERSEN v MAGNA CORPORATION, et al. (case nos. 136542-43)
Attorney for plaintiff Rick Petersen: John A. Braden/(231) 924-6544
Attorneys for defendants Magna Corporation and Midwest Employers Casualty Company: Daryl Royal/(313) 730-0055, Robert W. Macy/(586) 412-7800
Attorney for defendants BCN Transportation Services and TIG Insurance Company: Marc A. Kidder/(616) 942-2060
Attorney for amicus curiae Michigan Workers' Compensation Placement Facility: Martin L. Critchell/(248) 593-2450
Attorney for amicus curiae Accident Fund Insurance Company of America: Steven C. Hess/(248) 368-1606
Attorney for amicus curiae Michigan Self-Insurers' Association: Gerald M. Marcinkoski/(248) 433-1414
Attorney for amicus curiae St. Paul Fire & Marine Insurance Company: Duncan A. McMillan/(616) 459-0556
Attorney for amicus curiae Michigan Association for Justice: Donald M. Fulkerson/(734) 467-5620
Attorney for amicus curiae Michigan Health & Hospital Association: Marcus W. Campbell/(616) 831-1700

Attorney for amicus curiae American Insurance Association: Martin L. Critchell/(248) 593-2450
Attorney for amicus curiae Blue Cross Blue Shield of Michigan: Robert W. Powell/(313) 223-3500
Attorney for amicus curiae Michigan State Medical Society: Jonathan S. Berg/(313) 961-0200
Tribunal: Workers' Compensation Appellate Commission
At issue: MCL 418.315 provides that "the worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee" on unpaid medical expenses. What is the meaning of the term "prorate" in Section 315, and does that term represent an exception to the American Rule regarding attorney fees? Should the attorney fee be taken out of the overall medical expense award, or should it be imposed in addition to the medical expenses? What is the role, if any, of health care providers and medical insurers in prorating attorney fees?
Background: Rick Petersen was injured when he fell off his truck in 1997. A worker's compensation magistrate found Magna Corporation and Midwest Employers Casualty Company liable for Petersen's worker's compensation benefits, including his unpaid medical expenses. Magna and Midwest appealed the magistrate's ruling to the Workers' Compensation Appellate Commission, which affirmed. The Court of Appeals denied Magna and Midwest's application for leave to appeal, but the Supreme Court remanded the case to the Court of Appeals for consideration of several issues, including "the issue of awarding attorney fees on unpaid medical expenses." MCL 418.315 provides that "the worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee" on unpaid medical expenses. In a split unpublished opinion, the Court of Appeals held that, under Section 315(1), the employer or carrier must pay any assessed attorney fee on top of the medical expense itself. The lead opinion explained: "The plain language of the statute does not mandate that the health care provider assume responsibility for any portion of those fees." One judge concurred, stating that "while one would expect that it would rarely be appropriate to do so, I do not read § 315(1) as precluding the proration of a portion of the attorneys fees to the provider." The dissenting judge disagreed with the majority's reading of the "proration" sentence in Section 315(1). The dissenter would have held that the statute only permits a worker's compensation magistrate to prorate any attorney fee awarded between the medical care provider and the employee who received the medical treatment. Magna and Midwest appeal.

PEOPLE v SWAFFORD (case no. 136751)
Prosecuting attorney: Frank J. Bernacki/(313) 224-5785
Attorney for defendant Kobeay Quran Swafford: Craig A. Daly/(313) 963-1455
Trial Court: Wayne County Circuit Court
At issue: The defendant was charged with crimes in Wayne County, Michigan, but was arrested on unrelated federal charges in Tennessee. Before he was convicted and sentenced in the federal case, the Wayne County Prosecutor sent a notice of detainer to the U.S. Marshals in Tennessee. After the defendant was incarcerated, the detainer was confirmed by federal prison authorities. The defendant provided the prosecutor and the court clerk with notice of his request for disposition of the Michigan charges, but the defendant was not tried within the 180-day time limit imposed by the Interstate Agreement on Detainers. Is the defendant entitled to dismissal of the charges? Does the IAD require that a detainer be lodged at the institution where the defendant is incarcerated? If so, was there sufficient evidence in this case that the detainer was properly lodged?

Background: The Interstate Agreement on Detainers, MCL 780.601, is an interstate compact that requires "a person [who] has entered upon a term of imprisonment" – "whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner" – to be brought to trial within 180 days after providing certain notice to the prosecuting jurisdiction. Kobeay Quran Swafford was charged with crimes in Wayne County, Michigan while being held on federal charges in Tennessee; the Wayne County prosecutor sent the U.S. Marshals in Tennessee a notice of detainer on June 1, 2004. Swafford pleaded guilty to the federal charges in September 2004, and was sentenced on November 19, 2004 to federal prison. On March 2, 2005, Swafford was notified of the detainer; on March 7, the Wayne County Prosecutor's office and the Wayne County Circuit Court clerk's office received notice that Swafford was requesting disposition of the outstanding charges and that he would be released from federal prison on February 1, 2007. On September 16, 2005, the prosecutor's office was notified by federal authorities that the 180-day limit under the IAD had expired and that Swafford intended to move to dismiss the charges because he had not been tried within 180 days. On October 5, 2005, the Detroit Police Department took custody of Swafford, and he was arraigned on the outstanding charges. Swafford's motion to dismiss the charges was granted by the trial court, which concluded that the IAD had been violated. The prosecutor appealed; the first Court of Appeals ruling, in favor of the prosecutor, was vacated by the Michigan Supreme Court, which remanded the case to the Court of Appeals for reconsideration in light of documentation Swafford provided. On reconsideration, in a split unpublished opinion, the Court of Appeals again reversed the trial court and reinstated the charges against Swafford. The majority held that the June 1, 2004 detainer sent from the prosecutor to the U.S. Marshal was not a valid detainer for purposes of the IAD. Because no valid detainer under the IAD was ever filed, the majority held that the provisions of the IAD did not apply and that the trial court erred when it dismissed the charges against Swafford. The dissenting judge concluded that the detainer became a valid detainer for purposes of the IAD "no later than March 2, 2005, when it accompanied defendant to federal prison, was verified, and the prosecutor was notified that defendant was requesting disposition on the outstanding charges filed against him." The dissenting judge would have affirmed the trial court's dismissal of the charges. Swafford appeals.

Afternoon Session

MCNEIL, et al. v CHARLEVOIX COUNTY, et al. (case no. 134437)
Attorney for plaintiffs Scott Way and Jeff Legato: Samuel J. Frederick/(517) 371-8103
Attorney for defendants Charlevoix County and Northwest Michigan Community Health Agency: Dennis M. LaBelle/(231) 533-8635
Attorney for amicus curiae Michigan Association of Counties and Michigan Association for Local Public Health: Richard D. McNulty/(517) 372-9000
Attorney for amicus curiae Michigan Townships Association: Robert E. Thall/(269) 382-4500
Trial Court: Charlevoix County Circuit Court
At issue: Northwest Michigan Community Health Agency enacted a Clean Indoor Air Regulation that restricts workplace smoking; the CIAR also prohibits employers from taking adverse employment action against a person who asserts the right to a smoke-free environment. The plaintiffs contend that the CIAR is preempted by state law. Can the local health department

or the county board of commissioners create a private cause of action against a private entity that alters Michigan's at-will employment doctrine? Does the right or private cause of action created by the CIAR fall within the exceptions set forth in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692 (1982), to Michigan's at-will employment doctrine? Are the exceptions to Michigan's employment at-will doctrine on the basis of "public policy" consistent with this Court's decision in *Terrien v Zwit*, 467 Mich 56 (2002)?

Background: Northwest Michigan Community Health Agency is a multi-county district health department organized by Antrim, Charlevoix, Emmet and Otsego counties under Part 24 of the Public Health Code, MCL 333.2401 *et seq*. Acting under MCL 333.2441(1), Northwest Michigan adopted and approved a Clean Indoor Air Regulation, entitled "Regulation Eliminating Smoking in Public and Private Worksites and Certain Public Places." The CIAR bans smoking in workplaces and imposes restrictions on businesses that provide designated smoking areas. It also prohibits employers from taking adverse employment action against a person who asserts the right to a smoke-free environment. The plaintiffs, business owners and other individuals who are smokers, filed a declaratory action, contending that the CIAR is preempted by the state's Public Health Code. After a hearing, the trial court denied the plaintiffs' motion for summary disposition, reasoning that the Public Health Code did not expressly or impliedly preempt local regulations, such as the CIAR, related to the same or similar subject matter. In a published opinion, the Court of Appeals affirmed the trial court's ruling, reasoning that the Public Health Code expressly grants local health departments the authority to adopt regulations to safeguard the public health. The trial court had correctly ruled that the Public Health Code did not expressly or impliedly preempt local regulations, the Court of Appeals concluded. The plaintiffs appeal.

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